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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES KRISTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

JOHN J. KELLY
Chief State's Attorney
State of Connecticut

Counsel of Record:

SUSANN E. GILL
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373

STEVEN M. SELLERS
Chief, Appellate Unit

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QUESTIONS PRESENTED

I. WHETHER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE BARS A SUCCESSIVE PROSECUTION WHICH REQUIRES A REPETITION OF EVIDENCE OFFERED TO PROVE AN ELEMENT IN THE FIRST PROSECUTION

II. WHETHER THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE BARS REPROSECUTION WHEN THE DEFENDANT'S CONVICTION OF AN OFFENSE NOT INCLUDED IN THE CHARGING INSTRUMENT IS REVERSED ON APPEAL

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No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES KRISTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, entered in this proceeding on January 16, 1990.

OPINION BELOW

The opinion of the Connecticut Appellate Court is reported at 20 Conn. App. 495, 568 A.2d 809 (1990) and is reprinted in the appendix, p. A-1, *infra*. The prior decision of the Connecticut Appellate Court is reported at 11

Conn. App. 473, 528 A.2d 390 (1987) and is reprinted in the appendix, p. A-8, *infra*.

JURISDICTION

The decision of the Connecticut Appellate Court was entered on January 16, 1990. The order denying the timely motion for reconsideration and reargument en banc was entered on February 15, 1990. A copy of this order appears in the attached appendix, p. A-24, *infra*. The order of the Connecticut Supreme Court denying the state's petition for certification to appeal was entered on March 28, 1990. A copy of this order is included in the appendix at p. A-25, *infra*. The jurisdiction of this Court to review the judgment of the Connecticut Appellate Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

> property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 10 of the Rules of the Supreme Court provides in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorai will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict

with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut General Statutes §14-222a (Rev. to 1983) provided:

Sec. 14-222a. Negligent homicide with a motor vehicle. Any person who, in consequence of the negligent operation of a motor vehicle, causes the death of another person shall be fined not more than one thousand dollars or imprisoned not more than six months or both.

Connecticut General Statutes §53a-56b (Rev. to 1983 as amended by PA 83-534) provided in pertinent part:

(a) A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purposes of this section, "intoxication" shall include intoxication by alcohol or by drug or both.

(b) Manslaughter in the second degree with a motor vehicle while intoxicated is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

Connecticut General Statutes §53a-57 (Rev. to 1983) provided:

Sec. 53a-57. Misconduct with a motor vehicle: Class D felony. (a) A person is guilty of

> misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person.
>
> (b) Misconduct with a motor vehicle is a class D felony.

Connecticut Practice Book §4126 provides:

> Appeals may be taken to the supreme court in causes determined in the appellate court where the supreme court, upon petition of an aggrieved party or request of the appellate panel which heard the case, certifies the case for review.

STATEMENT OF THE CASE

On December 21, 1983, the respondent James Kristy, accompanied by four passengers, was operating a motor vehicle on the Boston Post Road in Milford, Connecticut. Respondent attempted to negotiate a right hand turn on West Street at a speed of over 61 miles per hour. He lost control of the car and slid into a telephone pole and guard rail, killing two passengers. Respondent and his companions had been drinking alcohol prior to the accident. An analysis of a sample of defendant's blood, taken about 35 minutes after the accident, indicated an alcohol content of .20 per cent by weight.

Respondent was charged with two counts of manslaughter in the second degree with a motor vehicle while intoxicated in violation of Connecticut General Statutes § 53a-56b (a) (Rev. to 1983 as amended by P.A. 83-534). *See supra* at 4. In addition to the offense charged, the trial court instructed the jury on two putative lesser included

offenses: misconduct with a motor vehicle, in violation of Connecticut General Statutes § 53a-57 (a) (Rev. to 1983), at the state's request, and negligent homicide, in violation of General Statutes § 14-222a (Rev. to 1983), at the defendant's request. *See supra* at 4, 5. The jury returned a verdict of guilty of two counts of misconduct with a motor vehicle.

Respondent appealed to the Connecticut Appellate Court, arguing that his conviction of misconduct with a motor vehicle violated his right to notice of the charges against him because that offense was not included in the offense charged. That court agreed, reversed the convictions, and remanded with directions to enter a verdict of not guilty to the charge of manslaughter in the second degree while intoxicated. *See* Appendix at A-8, *State v. Kristy*, 11 Conn. App. 473, 528 A.2d 390 (1987) (*Kristy I*).

Thereafter, the state filed a new information charging the defendant with two counts of misconduct with a motor vehicle. The defendant pled guilty to both counts, but, prior to sentencing, moved to vacate his pleas and dismiss the information because reprosecution was barred under the double jeopardy clause of the Fifth and Fourteenth Amendments. The trial court agreed, vacated the defendant's guilty pleas, and ordered the information dismissed.

The state appealed to the Connecticut Appellate Court. It argued that respondent's successful appeal of the jury's verdict should not preclude his subsequent prosecution on the offense for which he was originally convicted. The Appellate Court disagreed. It reasoned that "the *acquittal* on the charges of manslaughter in the

second degree, not the *conviction* on the erroneously charged misconduct counts, is the proper judgment on which we must focus our attention for purposes of our double jeopardy analysis." Appendix at p. A-6, *State v. Kristy*, 20 Conn. App. 495, 499, 568 A.2d 809 (1990) (*Kristy II*).

In determining that reprosecution was barred under double jeopardy, the Connecticut Appellate Court relied on a recent Connecticut Supreme Court opinion, *State v. Lonergan*, 213 Conn. 74, 566 A.2d 688 (1989) *petition for certiorari filed, Connecticut v. Lonergan*, ___ U.S. ___, 58 U.S.L.W. 3546 (1989), DN. 89-1295. *Lonergan* held that "if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not." *Id.* at 92. The state sought review of the Appellate Court judgment in the Connecticut Supreme Court, but the court denied certification to appeal. *See* Connecticut Practice Book §4126 *supra* at 5; Appendix at A-25, Order Denying Petition for Certification to Appeal.

REASONS FOR GRANTING THE PETITION

This case presents two important issues under the Double Jeopardy Clause of the Fifth and Fourteenth Amendments. First, it presents the question of whether double jeopardy bars retrial when the second prosecution requires a repetition of evidence offered to prove an

element in the first prosecution. A second, and independent, question is whether retrial is barred when the defendant's conviction of an offense not included in the charging instrument is reversed on appeal.

The first issue may be resolved by this Court's anticipated decision in *Grady v. Corbin*, ___ U.S. ___, 58 U.S.L.W. 3304 (November 7, 1989)(petition for certiorari granted)(hereinafter, *Corbin*).[1] If *Corbin* rejects the "same evidence" test for determining when double jeopardy bars a successive prosecution, then a grant of certiorari and remand to the Connecticut Appellate Court is in order. If, however, *Corbin* does not decide the issue, Connecticut urges this Court to grant certiorari so that the issue will be resolved.

Notwithstanding any rule announced in *Corbin*, however, Connecticut urges either full review or summary reversal of the Connecticut Appellate Court's opinion under the second question presented. The requested relief is warranted because of the Connecticut court's failure to abide by the federal constitutional principle permitting retrials after a conviction has been reversed on appeal.

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[1] In *Corbin* the defendant pled guilty to driving while intoxicated and driving on the wrong side of the road. The state later sought to prosecute him on homicide and assault charges. The New York Court of Appeals decided that the original and new charges each contained elements that the other did not. Nevertheless, the court concluded that the latter prosecution was barred by the Double Jeopardy Clause because the state would rely on the acts underlying the traffic offenses to prove the homicide and assault charges.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE APPROPRIATE DOUBLE JEOPARDY ANALYSIS FOR DETERMINING WHETHER A SUCCESSIVE PROSECUTION IS FOR THE "SAME OFFENSE"

The Double Jeopardy Clause of the Fifth Amendment to the Unites States Constitution, applied to the states through the Fourteenth Amendment; *Benton v. Maryland*, 395 U.S. 784 (1969); provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb[.]" Much of the current controversy in double jeopardy law concerns how to determine what constitutes the "same offense." Based upon differing interpretations of *Illinois v. Vitale*, 447 U.S. 410 (1980), some courts look to the evidence introduced in the first and required by the second prosecution, while others, relying on *Blockburger v. United States*, 284 U.S. 299 (1932) scrutinize the elements of the offenses involved.

In adopting the former course, the Connecticut Appellate Court followed the lead of its own Supreme Court and of a number of federal and state courts adopting a similar "overlap of proof" standard. These courts have interpreted dicta in *Vitale* as mandating an examination of the actual evidence offered at trial.[2] Under this standard,

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[2] These courts have generally pointed to the following language in *Vitale* to support this conclusion:

> In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much

(Continued on following page)

two offenses may be considered the same for double jeopardy purposes, despite dissimilar statutory elements, where the same evidence proves both offenses. *See, e.g., Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988); *United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *State v. Lonergan*, 213 Conn. 74, 566 A.2d 677

(Continued from previous page)

> prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977). . . .
>
> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

Illinois v. Vitale, 447 U.S. at 420-21.

Although this dicta has led some courts to look to the actual evidence offered at trial, this Court has never applied the actual evidence test to bar a second trial on double jeopardy grounds. *Thigpen v. Roberts*, 468 U.S. 27, 39 (1984) (Rehnquist, J., dissenting); *see People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983, 985 (1987) *overruling People v. Zegart*, 83 Ill.2d 440, 415 N.E.2d 341 (1980), *cert. denied*, 452 U.S. 948 (1981) ("It is apparent that the dicta of *Vitale* . . . carries little weight with the [United States] Supreme Court since it has not been cited by that court in subsequent decisions, and is not consistent with the court's decisions either before or after *Vitale*").

petition for certiorari filed, Connecticut v. Lonergan, ___ U.S. ___, 58 U.S.L.W. 3546 (1989); *State v. Deluca*, 108 N.J. 98, 527 A.2d 1355 *cert. denied*, 484 U.S. 944 (1987); *May v. State*, 726 S.W.2d 573 (Tex. Crim. App. 1987); *State v. Carter*, 291 S.C. 385, 353 S.E.2d 875 (1987).

Numerous other courts have reached a contrary conclusion. These courts construe *Vitale* as calling for the strict application of *Blockburger* in successive prosecution cases. That is, they continue to examine the statutory elements to determine whether each offense contains an element that the other does not. *See e.g., United States v. Rosenberg*, 888 F.2d 1406 (D.C. Cir. 1989); *United States v. Benton*, 852 F.2d 1456 (6th Cir.), *cert. denied, sub. nom., Campbell v. United States*, ___ U.S. ___, 109 S.Ct. 555 (1988); *United States v. Genser*, 710 F.2d 1426 (10th Cir. 1983); *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981) (en banc); *Carlson v. State*, 405 So.2d 173 (Fla. 1989); *People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983 (1987), *overruling People v. Zegart*, 83 Ill.2d 440, 415 N.E.2d 341 (1980), *cert. denied*, 452 U.S. 948 (1981).

Moreover, Justices of this Court themselves have acknowledged ambiguities in the *Vitale* decision in the multiple prosecution context. *See Thigpen v. Roberts*, 468 U.S. at 33-40 (Rehnquist, J. dissenting); *Illinois v. Zegart*, 452 U.S. at 948-51 (Burger, C.J. dissenting from denial of certiorari). That there is a need for clarification is evidenced by this court's recent granting of a petition for certiorari in *Grady v. Corbin*, ___ U.S. ___, 58 U.S.L.W. 3304 (November 7, 1989).

If these varied precedents demonstrate anything, it is the troubling trend toward inconsistency and unpredictability in double jeopardy analysis of successive prosecution cases. Certiorari review of this case would resolve the split among the courts as to the nature of double jeopardy analysis in such prosecutions and, in so doing, lead to more consistent interpretations of the Double Jeopardy Clause. Consistency is clearly needed by the courts and prosecutors who must determine how and when successive criminal charges may constitutionally be brought against an accused. Certiorari should be granted to review this issue.[3]

II. BY PREVENTING RESPONDENT'S REPROSECUTION AFTER HIS CONVICTIONS WERE OVERTURNED, THE CONNECTICUT APPELLATE COURT DECIDED A FEDERAL QUESTION IN A MANNER CONTRARY TO FEDERAL CONSTITUTIONAL LAW

The Connecticut Appellate Court foreclosed the state from reprosecuting respondent for two counts of misconduct with a motor vehicle despite his earlier convictions for that offense. In so doing, it ignored the " 'venerable principl[e] of double jeopardy jurisprudence' that '[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, *Burks v. United States*, [437 U.S. 1 (1978)], poses no bar to further prosecution on the same

---

[3] Alternatively, if *Corbin* rejects the "same evidence" test relied on by the Connecticut Appellate Court in this case, Connecticut requests a remand to the lower court for reconsideration in light of *Corbin*.

charge. *United States v. Scott*, [437 U.S. 82, 90-91 (1978)]." *Montana v. Hall*, ___ U.S. ___, 107 S.Ct. 1825, 1826 (1987) (per curiam); *see also Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957); *United States v. Ball*, 163 U.S. 662 (1896).[4]

The Connecticut Appellate Court has thus "decided a federal question in a way in conflict with applicable

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[4] Several theories support this principle. According to one, a new trial is justified on the ground that "the appellant has waived his plea of former jeopardy by asking that the conviction be set aside." *See Green v. United States*, 355 U.S. 184, 189 (1957)(footnote omitted); *see also Bryan v. United States*, 338 U.S. 552 (1950); *Trono v. United States*, 199 U.S. 521 (1905). Another theory views the new trial as "continuing the same jeopardy which attached at the first trial by reasoning that jeopardy does not come to an end until the accused is acquitted or his conviction becomes final." *Green v. United States*, 355 U.S. at 189; *see also Justices of the Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984); *Price v. Georgia*, 398 U.S. 323, 329 (1970). A third and most widely accepted justification for permitting retrials after a reversal for trial error was offered by Justice Harlan in *United States v. Tateo*, 377 U.S. 463, 466 (1964):

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest.

decisions of this Court." *See* Rule 10, Rules of the Supreme Court of the United States, *supra* at 3-4. Most notably, the opinion below conflicts with this Court's *per curiam* decision in *Montana v. Hall*, ___ U.S. ___, 107 S.Ct. 1825 (1987).

In *Hall*, the defendant was convicted of incest arising out of his sexual assault of his wife's daughter. On appeal, the Montana Supreme Court concluded that the conviction was void because, at the time of the offense, the incest statute did not apply to sexual assaults against step children. *Id.* at 1826. The Supreme Court of Montana also determined that double jeopardy barred a successive prosecution for sexual assault for two reasons. First, after analyzing the elements of sexual assault and incest, it concluded that they were the same offense for double jeopardy purposes. *Id.* Alternatively, because defendant had been convicted of a nonexistent offense, the court determined that retrial would subject the defendant to double jeopardy. *Id.* This Court rejected both bases for preventing reprosecution. After noting that there was no suggestion that the evidence introduced at trial was insufficient to convict defendant, *Hall* held that "trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause." *Id.* at 1827.

This holding is fully applicable here. The reason for the reversal of respondent's convictions – the failure of the charging documents to accord him constitutionally adequate notice – is plainly unrelated to guilt or innocence. Moreover, respondent has never suggested that the

evidence presented was insufficient to support the verdict. Further, respondent's conviction of an offense not included in the charging instrument should no more nullify the double jeopardy effect of the initial conviction than did Hall's conviction of a nonexistent crime. Therefore, under the teachings of *Hall*, the Connecticut court clearly erred in preventing reprosecution.

None of the interests served by the Double Jeopardy Clause would be violated by reprosecution in this case. The Double Jeopardy Clause is designed to ensure that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

This is not a situation in which the state held certain charges in abeyance and forced the accused to submit to successive trials. The state did not try respondent first for manslaughter, and then, after acquittal, bring a second prosecution for misconduct. Rather, both charges were prosecuted in the same proceeding, albeit in a way that did not provide respondent with constitutionally adequate notice. Further, the guilty verdict returned in the initial trial assuages fear that respondent, although innocent, will be found guilty through the shear force of repeated prosecutions.

The Connecticut Appellate Court's failure to afford the state an opportunity to retry respondent is contrary to

federal constitutional law and should be remedied. Connecticut respectfully requests either full review or summary reversal of its decision.

CONCLUSION

The Connecticut Appellate Court has adopted a theory of constitutional analysis which bars, as a violation of double jeopardy, successive prosecutions involving different crimes proved by the same evidence. It has further determined that reprosecution is prohibited when a conviction is overturned due to violation of an accused's sixth amendment right to notice. Its decision exemplifies the expansive interpretation of double jeopardy protections proliferating nationally and illustrates the pressing need for guidance from this Court.

The State of Connecticut respectfully urges this Court to grant the petition for certiorari and either reverse in light of *Grady v. Corbin*, set the matter down for full hearing, or order summary reversal.

Respectfully submitted,

THE STATE OF CONNECTICUT
Counsel of Record:

SUSANN E. GILL
Assistant State's Attorney
Appellate Unit
Office of the Chief
State's Attorney

May, 1990

No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF CONNECTICUT,

Petitioner,

v.

JAMES KRISTY,

Respondent.

APPENDIX

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STATE OF CONNECTICUT *v.* JAMES KRISTY
(7771)

BORDEN, DALY AND NORCOTT, JS.

The state, with the permission of the trial court, appealed from the judgment of that court granting the defendant's motion to dismiss, on double jeopardy grounds, an information charging him with misconduct with a motor vehicle. In prior proceedings stemming from the same incident, the defendant had been charged with manslaughter in the second degree with a motor vehicle and had been convicted of misconduct with a motor vehicle, which the state had asserted as a lesser offense included in the crime charged. He had successfully appealed from that prior conviction on the ground that he had been charged only with manslaughter in the second degree with a motor vehicle while intoxicated and, because misconduct with a motor vehicle is not a lesser offense included in that crime, his conviction of that crime violated his constitutional right to be apprised of the charges against him. *Held* that because the defendant had been acquitted in the prior proceedings of manslaughter in the second degree with a motor vehicle and because the state intended to rely on the same evidence here in prosecuting the defendant on charges of misconduct with a motor vehicle, the trial court did not err in dismissing those charges.

Argued November 7, 1989 – decision released January 16, 1990.

Information charging the defendant with two counts of the crime of misconduct with a motor vehicle, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, where the court, *Gray, J.*, granted that defendant's motion to dismiss, and

rendered judgment thereon, from which the state, with the permission of the trial court, appealed to this court. *No error.*

Vincent J. Dooley, deputy assistant state's attorney, with whom, on the brief, were *Mary Galvin*, state's attorney, and *Mark Hurley*, deputy assistant state's attorney, for the appellant (state).

Timothy H. Everett, with whom were *Michael R. Sheldon* and *Christine Curtiss*, certified legal intern, and, on the brief, *Todd Fernow*, for the appellee (defendant).

NORCOTT, J. The state appeals, with the permission of the trial court, from the judgment of the court granting the defendant's motion to dismiss the information on double jeopardy grounds. On appeal, the state argues that the trial court erred in concluding that the institution of this second prosecution against the defendant violated his constitutional protection against successive prosecutions for the same offense. We find no error.

The following facts are relevant to this appeal. On December 21, 1983, as approximately 9:45 p.m., the defendant, while accompanied by four passengers, was operating a motor vehicle on the Boston Post Road in Milford. The defendant failed to negotiate a turn at the intersection of West Street and the Boston Post Road, and lost control of the vehicle causing it to slide and then collide with a telephone pole and guard rail. It was later determined that the speed of the defendant's vehicle at the time of the accident was 61.6 miles per hour and that the defendant had been drinking prior to the accident. Two of the passengers died as a result of the crash.

At the first trial, the defendant was charged with two counts of manslaughter in the second degree with a motor vehicle while intoxicated in violation of General Statues § 53a-56b(a).[1] At the close of the trial, the trial court instructed the jury, at the state's request, on the purported "lesser included offense" of misconduct with a motor vehicle in violation of General Statutes § 53a-57(a).[2] The jury subsequently returned a verdict of guilty of two counts of misconduct with a motor vehicle.

Thereafter, the defendant appealed to this court, arguing that because misconduct with a motor vehicle was not a lesser included offense of manslaughter in the second degree with a motor vehicle while intoxicated, his conviction of that crime violated his constitutional right to be apprised of the charges against him. We agreed, reversed the convictions, and remanded the case with direction to render judgment of not guilty to the charge of manslaughter in the second degree with a motor vehicle while intoxicated. See *State v. Kristy*, 11 Conn. App. 473, 481-85, 528 A.2d 390, cert denied, 206 Conn. 801, 535 A.2d 1315 (1987) (*Kristy I*).

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[1] General Statutes § 53a-56b provides: "MANSLAUGHTER IN THE SECOND DEGREE WITH A MOTOR VEHICLE CLASS C FELONY. (a) A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug."

[2] General Statutes § 53a-57 provides: "MISCONDUCT WITH A MOTOR VEHICLE: CLASS D FELONY. (a) A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person."

After our decision in *Kristy I*, the state charged the defendant with two counts of misconduct with a motor vehicle arising out of this same incident. On April 18, 1988, the defendant filed a motion to dismiss on double jeopardy grounds. On September 20, 1988, the defendant entered a plea of guilty to both counts of the information, and the case was continued until October 20, 1988, for a presentence investigation. On that date, the defendant filed a supplemental memorandum in support of his motion to dismiss on double jeopardy grounds dealing primarily with this court's decision in *State v. Lonergan*, 16 Conn. 358, 548 A.2d 718 (1988), aff'd, 213 Conn. 74, ___ A.2d ___ (1989). Thereafter, on November 15, 1988, the state filed a memorandum in opposition to the defendant's motion to dismiss. On November 23, 1988, the court, *Gray, J.*, heard oral argument on the motion and continued the hearing until January 5, 1989, so that the parties could submit additional briefs addressing *Lonergan* and so that the state could determine whether it would be relying upon the same evidence for the second prosecution.

At the hearing on January 5, 1989, the court reviewed the defendant's supplemental memorandum[3] and ascertained from the state that it planned to rely upon the same evidence in the second prosecution. The court, relying on our decision in *Lonergan*, vacated the defendant's guilty pleas and granted the defendant's motion to dismiss on double jeopardy grounds. This appeal ensued. The defendant now contends that the Supreme Court's

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[3] The court noted that the state had filed no memorandum.

recent resolution of the appeal in *State v. Lonergan*, 213 Conn. 74, ___ A.2d ___ (1989), is dispositive of this case and requires that we affirm the trial court's action in this case. We agree.

In *Lonergan*, our Supreme Court adopted the test, initially applied in that case by this court, that in successive prosecutions, " 'if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not.' *State v. Lonergan*, supra, 368." *State v. Lonergan*, supra. 92.[4] Here, the state concedes, as it did in *Lonergan*, that the present prosecution arises out of the same transaction as did the prior prosecution and that the state will rely on the same evidence this second time. Nevertheless, it argues that the second prosecution does not violate the double jeopardy protection because *Lonergan* is distinguishable from this case.[5] The essence of the state's argument is that in

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[4] In *State v. Lonergan*, 213 Conn. 74, 92, ___ A.2d ___ (1989) our Supreme Court, applying this test, held that the prosecution of the defendant for operating a motor vehicle while under the influence of liquor or drugs, which followed his acquittal in a prior trial of the charge of manslaughter in the second degree with a motor vehicle while intoxicated, violated the double jeopardy clause.

[5] We note that, at the time of oral argument in this court, the Supreme Court's decision in *State v. Lonergan*, 213 Conn. 74,

(Continued on following page)

Kristy I, unlike *Lonergan*, the state obtained a jury conviction, albeit on an erroneous basis, and that conviction was later successfully appealed. Arguing that retrial after a successful appeal of previously litigated matters does not offend double jeopardy rights, the state cites *Ball v. United States*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896),[6] for the proposition that the successive prosecution here does not involve a double jeopardy analysis. We are not persuaded by this argument.

In *Kristy I*, the *acquittal* on the charges of manslaughter in the second degree, not the *conviction* on the erroneously charged misconduct counts, is the proper judgment on which we must focus our attention for the purposes of our double jeopardy analysis. In *Kristy I*, had the trial court not instructed the jury, at the state's request, on misconduct with a motor vehicle as a "lesser

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(Continued from previous page)

___ A.2d ___ (1989), had not yet been released. At oral argument, however, the state argued that if affirmed, the *Lonergan* case would be *distinguishable* from the present case, but, if reversed, *Lonergan* would be *undistinguishable* and dispositive.

[6] The case of *Ball v. United States*, 163 U.S. 662, 16 S. Ct. 1192, 41 L.Ed.2d 300 (1986) (sic), dealt with a fatally defective indictment from which a guilty verdict was obtained. The defendants successfully appealed, and the guilty verdicts were overturned. When the state corrected the defects and reprosecuted the defendants for the same crime, the United States Supreme Court held that the defendant's double jeopardy rights were not violated because they waived those rights by appealing from the convictions. The state argues that *Ball* stands for the proposition that whenever a defendant successfully challenges on appeal a jury's verdict of guilt, on retrial, double jeopardy conditions are not at play.

included offense," and had the jury acquitted the defendant of manslaughter with a motor vehicle while intoxicated, as it actually did, the state would now be barred under *Lonergan* from reprosecuting the defendant for misconduct with a motor vehicle. Having obtained an improper conviction because of the erroneous jury charge in *Kristy I*, the state would enjoy an unjust benefit if we were to allow it to reprosecute the defendant on the same charges in a second trial.

We note that the state correctly draws our attention to a footnote in *Kristy I* suggesting that there would be no double jeopardy bar to the reprosecution of the defendant for misconduct with a motor vehicle. See *Kristy I*, supra, 483-84 n.6. This court, of course, did not have the benefit of the Supreme Court's recent *Lonergan* decision. In light of that decision, the footnote language in *Kristy I* to which the state refers, has been superceded by the Supreme Court's decision in *Lonergan*.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT v. JAMES KRISTY
(3856)

BORDEN, DALY AND BIELUCH, Js.

The defendant, who had been charged with two counts of the crime of manslaughter in the second degree with a motor vehicle while intoxicated, was convicted of two counts of misconduct with a motor vehicle in connection with an accident in which two passengers in a vehicle he was operating died. The defendant appealed to this court claiming, inter alia, that the trial court erred in instructing the jury, at the state's request, that misconduct with a motor vehicle is a lesser offense included in the crime of manslaughter in the second degree with a motor vehicle while intoxicated, *Held*:

1. The defendant's claim to the contrary notwithstanding, the trial court's finding that the defendant, who had been taken to a hospital after the accident, voluntarily consented to the release of his hospital records including the results of a blood test taken as a routine hospital procedure, was not clearly erroneous.

2. The trial court did not err in denying the defendant's motion to suppress the results of a blood test and a urine test performed at the request of the police prior to his arrest; the defendant could not prevail on his claim that, absent consent, a formal arrest is an absolute prerequisite to blood and urine tests.

3. Because it is possible to commit the crime of manslaughter in the second degree with a motor vehicle while intoxicated without having the mental state required for conviction of misconduct with a motor vehicle, the latter is not a lesser offense included in the former; the defendant was therefore deprived of a fair trial by his

conviction of a crime with which he had not been charged.

Argued January 5 – decision released July 7, 1987

Information charging the defendant with two counts of the crime of manslaughter in the second degree with a motor vehicle while intoxicated, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number five, and tried to the jury before *Rottman, J.*; verdict and judgment of guilty of two counts of misconduct with a motor vehicle, from which the defendant appealed to this court. *Error; judgment directed.*

The appellant and the appellee filed motions for reargument which were denied.

Timothy H. Everett, with whom, on the brief, were *Matthew Stokely* and *Bradley Larson*, certified legal interns, for the appellant (defendant).

James G. Clark, assistant state's attorney, with whom, on the brief, were *Irving Smirnoff*, assistant state's attorney, and *Robert B. Clark*, certified legal intern, for the appellee (state).

DALY, J. The defendant appeals from the judgment of conviction, after a jury trial, of two counts of misconduct with a motor vehicle in violation of General Statutes § 53a-57.[1] The defendant had been charged by information with two counts of manslaughter in the second

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[1] General Statutes § 53a-57(a) provides: "A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person."

degree with a motor vehicle while intoxicated. The defendant claims that the trial court erred (1) in denying his motion to suppress, thereby admitting into evidence results of tests performed on blood and urine samples taken from him when not under arrest, and (2) in improperly charging the jury that misconduct with a motor vehicle is a lesser included offense of manslaughter in the second degree with a motor vehicle while intoxicated, a violation of General Statutes § 53a-56b(a).[2] We find error on the second claim.

The jury could reasonably have found the following facts: On December 21, 1983, at approximately 9:45 p.m., the defendant was operating his motor vehicle and carrying four passengers on the Boston Post Road in Milford. An eyewitness observed the car changing lanes two or three times, moving erratically and reaching a speed of approximately sixty miles per hour in a forty mile per hour zone. One of the backseat passengers was observed holding a can of beer. The car was seen attempting to

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[2] At the time of the information in this case General Statutes (Rev. to 1983) § 53a-56b provided in pertinent part: "(a) A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purposes of this section, 'intoxication' shall include intoxication by alcohol or by drug or both."

General Statutes § 53a-56b (a) now provides: "A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug."

make a sudden right turn onto West Street, at a speed later determined to be 61.6 miles per hour. The car failed to negotiate the turn and slid into a telephone pole and guard rail. Two passengers died as a result of the crash. All five men in the car had been drinking beer from a case which had been purchased earlier in the evening. Beer cans were found in and around the car immediately following the collision.

The defendant was taken to the Milford Hospital. A blood sample (hereinafter blood sample one) was taken by hospital personnel at approximately 10:25 p.m. as a routine hospital procedure. The defendant signed a consent form releasing his hospital records to the police, including the test results from blood sample one. That test indicated a blood alcohol level of .20 percent by weight in the defendant's blood. A second blood sample (hereinafter blood sample two) was taken from the defendant at police request at 11:05 p.m. and turned over to the police. Blood sample two indicated a blood alcohol content of .14 percent. At 12:30 a.m. a urine sample was taken which revealed a blood alcohol level of .12 percent by weight. This sample was also requested by and turned over to the police. The defendant was arrested some four months later, on May 5, 1984.

The defendant filed a motion to suppress and objected at trial to the admission of the test results from *both* blood samples and the urine sample, claiming that he had neither consented to their taking nor that he was under arrest at the time they were taken. The trial court admitted all the test results. The court concluded that the defendant had consented to the release of his hospital records including the test results from blood sample one,

and that consent was unnecessary for the police-obtained samples. The court further stated that "there was a sufficient basis in the fact situation for the belief that a blood sample would produce evidence."

At the state's request, the trial court charged the jury as to the lesser offense of misconduct with a motor vehicle, and at the defendant's request also instructed as to negligent homicide in violation of General Statutes § 14-222a.[3]

I

The first issue raised by the defendant is whether the results of the chemical analyses of his blood and urine introduced into evidence should have been suppressed as the products of an unconstitutional search and seizure under the fourth, fifth, sixth and fourteenth amendments to the United States constitution and under article first, § 8 of the Connecticut constitution.

The defendant relies primarily on *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966), and *State v. Towry*, 26 Conn. Sup. 35, 210 A.2d 455 (1965). In *Schmerber*, the Supreme Court held that compulsory administration of a blood test plainly implicates the fourth amendment concepts of search and seizure. Our Supreme Court has also stated that the taking of a blood sample

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[3] General Statutes § 14-222a provides: "Any person who, in consequence of the negligent operation of a motor vehicle, causes the death of another person shall be fined not more than one thousand dollars or imprisoned not more than six months or both."

constitutes a search and seizure within the meaning of the fourth amendment to the federal constitution. *State v. Acquin*, 177 Conn. 352, 354, 416 A.2d 1209 (1979). The question that remains, therefore, is whether the search and seizure was reasonable.

The defendant's reliance on *Schmerber* is premised on the fact that the defendant in that case had been arrested prior to a blood sampling, while in the present case the defendant had not yet been arrested. The *Schmerber* court reasoned that probable cause to arrest the defendant for driving while intoxicated had been present, and that the arresting officer could reasonably have believed that the delay necessary to obtain a search warrant would imperil the existence of the evidence sought, since the alcohol content of blood begins to diminish shortly after drinking stops. The court stated that there was not enough time to locate a magistrate and to obtain a warrant without losing the evidence. The court was also satisfied that the hospital procedure used to extract the blood was reasonable. On the basis of three considerations, namely the existence of probable cause, the evanescent nature of the evidence and the reasonableness of the intrusion, the court held that there had been no violation of the petitioner's right to be free from *unreasonable* searches and seizures. *Schmerber v. California*, supra, 767.

The defendant argues that the holding in *Schmerber* is limited by the fact that the defendant had been arrested prior to the taking of the blood sample.

The defendant also relies on *State v. Towry*, supra. In that case, the Appellate Division of the Circuit Court held

that a state court must apply federal constitutional standards, and therefore concluded that a blood sample taken from an unconscious defendant thirteen days before his arrest was the result of an unreasonable, and therefore unconstitutional search and seizure not incident to a lawful arrest. It should be noted that *Towry* predates *Schmerber*. Moreover, as a constitutional intermediate appellate court we are not bound by the precedent of the statutory Appellate Division of the Circuit Court. *State v. Kluttz*, 9 Conn. App. 686, 694 n.8, 521 A.2d 178 (1987); *State v. Hyatt*, 9 Conn. App. 426, 430, 519 A.2d 612 (1987).

There are three sampling episodes in the present case. Blood sample one was taken as a routine hospital procedure, while blood sample two and the urine sample were taken at the request of the police. In ruling on the motion to suppress, the trial court held that the defendant consented to the release of his hospital records, including the test results of blood sample one. In order to introduce evidence obtained after consent has been given, the state must establish that consent was freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S 543, 548, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968). Whether that consent was so given is a question of fact to be determined by the trial court from the totality of the circumstances. *State v. Torres*, 197 Conn. 620, 627, 500 A.2d 1299 (1985).

In this case, the court found that there was no showing that the defendant was under any duress or was incapable of acting in his own interests. The trial court also had before it a consent form signed by the defendant which released his hospital records.

The defendant's brother testified that he did not see the defendant sign the form since he was not in the room when it was signed, but the defendant's sister testified that the brother did in fact witness the defendant's signature. Further, a police officer testified that the defendant stated that his signing of the consent form was a free and voluntary act. In his motion to suppress, the defendant claimed he had not consented to the release of his hospital records. On appeal, however, the defendant has not specified any basis upon which he challenges his consent.

When the totality of the circumstances is considered, the trial court's finding that the defendant voluntarily consented to the release of the hospital records, including blood sample one, is not clearly erroneous.

This leaves for our consideration the results of blood sample two and the urine sample. The defendant asserts that in order for the holding in *Schmerber* to permit a blood test without a search warrant, the party must have been arrested prior to the extraction of blood. There is a split in authority as to whether an arrest prior to the extraction of blood is required.

Some courts which have confronted the issue have interpreted *Schmerber* to require an arrest before a blood sample can be taken. They include *United States v. Harvey*, 701 F.2d 800 (9th Cir. 1983); *Layland v. State*, 535 P.2d 1043 (Alaska 1975); *State v. Wetherell*, 82 Wash. 2d 865, 514 P.2d 1069 (1973); and *People v. Superior Court of Kern County*, 6 Cal. 3d 757, 100 Cal. Rptr. 281, 493 P.2d 1145 (1972). Others have read *Schmerber* to require only probable cause to believe that a crime had been committed and probable cause to believe that evidence of the crime in

question will be found, and that an immediate warrantless search is necessary in order to prevent the destruction or loss of evidence. See *People v. Morse*, 68 Mich. App. 150, 242 N.W.2d 47 (1976); see also 2 W. LaFave, Search and Seizure § 5.4(b), p. 521-24 (1987), and cases cited therein.

The reasoning used in a case subsequent to *Schmerber; Cupp v. Murphy*, 412 U.S 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); provides a sturdy framework for our analysis of this issue. In *Cupp*, the United States Supreme Court held that exigent circumstances can justify a search based on probable cause when destruction of the evidence is imminent and the intrusion is minimal. In *Cupp*, the defendant went to the police station voluntarily after his wife had been strangled. He was detained for a brief period and asked to consent to having his fingernails scraped. He refused. Nonetheless, the police, noticing what they thought was a spot of blood on the defendant's finger, took a scraping from beneath his nails which contained skin, blood-cells and fabric from the victim's clothing. This search was done without a warrant and before the defendant was arrested. In fact, although the police had probable cause to arrest the defendant at the time of the scraping, they did not do so until a month later. The court held that the search passed constitutional muster for three reasons: (1) the existence of probable cause for arrest; (2) the limited nature of the search; and (3) the ephemeral nature of the evidence. Thus, the *Cupp* court did not require an actual arrest prior to the search as long as probable cause existed for an arrest.

We do not believe that either the *Schmerber* decision or the *Cupp* decision suggests that a formal arrest is an

absolute prerequisite to a blood test for alcohol absent consent, and we are unwilling to impose such a requirement. Accord *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982); *State v. Dewey*, 272 N.W.2d 355 (Minn. 1978). Our Supreme Court has recently stated that a person has no constitutional right to withhold nontestimonial evidence when the state's demand is supported by probable cause. *Buckley v. Muzio*, 200 Conn. 1, 8, 509 A.2d 489 (1986).

In this case, the defendant has never claimed that there was a lack of probable cause to arrest him. Indeed, the evidence is clearly to the contrary. *Schmerber* itself, the primary case upon which the defendant relies, highlights the short life of alcohol in the bloodstream upon cessation of drinking.

Thus, we conclude that the trial court did not err in denying the defendant's motion to suppress, thereby allowing the admission at trial of the results of both blood samples and the urine sample.

II

The defendant also challenges his conviction of the offense of misconduct with a motor vehicle under General Statutes § 53a-57. He claims that misconduct with a motor vehicle is not a lesser included offense of manslaughter in the second degree with a motor vehicle while intoxicated; General Statutes § 53a-56b; with which he was originally charged.

If this assertion is correct, the defendant was convicted of an offense for which he was not on trial. In such

a case, the conviction would be improper and the judgment could not stand. Our Supreme Court has held that a defendant convicted of an offense of which he was never given notice has been deprived of a fundamental constitutional right and of a fair trial. *State v. Martin*, 187 Conn. 216, 218-19, 445 A.2d 585 (1982); *State v. Rodriguez*, 180 Conn. 382, 399 n.10, 429 A.2d 919 (1980); see U.S. Const., amend. VI; Conn. Const., art. I, § 8. Thus, notwithstanding the fact that this claim of error was not raised at the trial, we will review it under *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973).

General Statutes (Rev. to 1983) § 53a-56b(a), in effect at the time of the filing of the information in this case provided: "A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purpose of this section, 'intoxication' shall include intoxication by alcohol or by drug or by both." The defendant, therefore, had notice to defend this charge and any lesser offenses included within this crime. *State v. Jacobowitz*, 182 Conn. 585, 591, 438 A.2d 792 (1981), citing *Paterno v. Lyons*, 334 U.S. 314, 320-21, 68 S.Ct. 1044, 92 L.Ed.1409 (1948). Manslaughter in the second degree with a motor vehicle while intoxicated does not contain a mental state element. Its elements are: (1) operation of a motor vehicle; (2) while intoxicated; and (3) which causes the death of another person. Thus, proof of a mental state was not necessary to support a conviction under this statute. The essential questions for the trier of fact on this charge, then, were whether the defendant was intoxicated by alcohol or by drug while operating a motor vehicle

and whether the death of another person was a consequence of that intoxication.

The crime for which the defendant was convicted, misconduct with a motor vehicle, provides that a person is guilty of the offense "when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person." General Statutes § 53a-57. Criminal negligence is defined in General Statutes § 53a-3(14): "A person acts with 'criminal negligence' with respect to a result or to a circumstance described by a statute defining an offense when he *fails to perceive* a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the *failure to perceive* it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . ." (Emphasis added.) Thus, conviction of misconduct with a motor vehicle requires proof of the mental state involved in criminal negligence which is not an element of manslaughter.

In Connecticut, there is a four prong test to determine when a lesser included offense instruction should be given.[4] The second prong of that doctrine is relevant

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[4] "A defendant is entitled to an instruction on a lesser offense if, and only if, the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction

(Continued on following page)

here. "[I]f it is not possible to commit the crime charged in the information or bill of particulars without first having committed [the] lesser crime," then the defendant can be convicted of the lesser crime. *State v. Whistnant*, 179 Conn. 576, 584, 427 A.2d 414 (1980). All of the elements of misconduct with a motor vehicle, i.e. criminal negligence, need not be proven when proving manslaughter in the second degree with a motor vehicle while intoxicated. It is possible to operate a motor vehicle while intoxicated, resulting in the death of another, *without failing to perceive* the risk involved in driving in that condition. For example, one can be intoxicated, and also perceive the risks involved in driving in that condition, and yet ignore those risks, and then, because of the intoxication, be unable to maintain sufficient control of the motor vehicle to avoid a collision.[5] We conclude that the defendant was convicted of a crime with which he

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(Continued from previous page)

of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant innocent of the greater offense but guilty of the lesser." *State v. Whistnant*, 179 Conn. 576, 588, 427 A.2d 414 (1980).

[5] Such behavior is "reckless" as defined in General Statutes § 53a-3(13) which provides: "A person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is *aware of and consciously disregards* a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." (Emphasis added.)

was not charged, and which was not a lesser included offense of the crime charged.[6]

We therefore conclude that the defendant was deprived of a fair trial. *State v. Rodriguez*, supra. It is clear, however, that there can be no review of the judgment of

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[6] We note that there is no double jeopardy barrier to the filing of a *new* information charging misconduct with a motor vehicle, if filed within the statutory limitation period. Federal courts have held that when a defendant is tried for a crime which includes both greater and lesser offenses, conviction of the lesser bars retrial on the greater, and vice-versa. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977); *Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S.Ct. 2221, 53 L. Ed. 2d 187 (1977). Before a double jeopardy barrier arises, however, the two offenses must not only arise out of the same act or transaction but must be substantially the same. *State v. Goldson*, 178 Conn. 422, 424, 423 A.2d 114 (1979). The following test for the latter requirement was approved by the *Goldson* court as set out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932): " 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . .' "

Applying the *Blockburger* test to this case, it is possible to commit manslaughter in the second degree while intoxicated, as charged, without committing misconduct with a motor vehicle; it is also possible to satisfy the criminal negligence requirement for misconduct with a motor vehicle without satisfying the intoxication requirement for the higher offense. Because the offenses are not substantially the same for double jeopardy purposes, there would be no constitutional impediment to a new trial on misconduct with a motor vehicle, an offense for which the defendant has never been charged and which was not included in the offense for which he was tried. See *State v. Martin*, 187 Conn. 216, 223 n.6, 445 A.2d 585 (1982).

acquittal on the manslaughter in the second degree while intoxicated charge even though errors may underlie that judgment. *State v. Jacobowitz*, supra, 594. Nor can we order a new trial on the misconduct with a motor vehicle offense under the present information since it does not charge that offense.[7] *State v. Martin*, supra, 222-23.

There is error, the judgment is set aside and the case is remanded with direction to render judgment that the defendant is not guilty of manslaughter in the second degree with a motor vehicle while intoxicated and ordering that he be discharged.

In this opinion the other judges concurred.

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[7] We note, in passing, that the analysis of our Supreme Court in *State v. Rodriguez*, 180 Conn. 382, 407, 429 A.2d 919 (1980), is inapplicable here. In that case, the court concluded that "an offense that would be a lesser included offense but for its requirement of a less culpable state of mind than that required for the greater, will be deemed a lesser included offense." In the present case, however, the greater offense, manslaughter in the second degree with a motor vehicle while intoxicated, does not contain *any* mental state element. In *Rodriguez*, both the greater and lesser offenses required mental states which were on the same continuum, differentiated only by the level of culpability. Here, the charged offense was not on the mental state continuum at all. Thus, we cannot deem misconduct with a motor vehicle a lesser included offense of manslaughter in the second degree with a motor vehicle while intoxicated.

APPELLATE COURT
STATE OF CONNECTICUT

AC 7771

State of Connecticut

v.

James Kristy February 15, 1990

ORDER

(Filed Feb. 20, 1990)

The motion of the State of Connecticut, filed January 26, 1990, for reconsideration and reargument en banc, having been presented to the Court, it is hereby ordered denied.

By the Court,

/s/ Cynthia M. Gworek
Cynthia M. Gworek
Assistant Clerk-Appellate

Notice sent: 2-16-90

Vincent J. Dooley, Deputy Assistant State's Attorney

Mark Hurley, Deputy Assistant State's Attorney

Steven M. Sellers, Assistant State's Attorney

Susann E. Gill, Assistant State's Attorney

Clerk, Superior Court, Ansonia/Milford at GA 5, 71787

Hon. Leander C. Gray

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-89-1115

State of Connecticut

v.

James Kristy

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the State of Connecticut for certification to appeal from the Appellate Court (20 Conn. App. 495), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

/s/ Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: March 28, 1990

Notice to: 3/28/90

Clerk, Superior Court, Ansonia-Milford at G.A. 5, CR5-71787

Clerk, Appellate Court

Mark Hurley, Deputy Assistant State's Attorney

Office of the Chief State's Attorney-Appellate Unit

University of Connecticut School of Law Legal Clinic

Susann E. Gill, Assistant State's Attorney, in support of petition; *Timothy H. Everett* in opposition.